Supreme Court, U.S.
FILED

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In The
Supreme Court of the United States

SURETIES TRACY NGUYEN

and

KHANH BUI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a conflict exists between decisions within the Circuits of the United States Court of Appeals concerning whether a District Judge should conduct a hearing to determine cost to the government in apprehending an alleged federal fugitive before directing entire forfeiture of a $100,000 personal surety bond placed by relatives of that fugitive against their personal residences, said conflict supporting the grant of Certiorari to the U.S. Court of Appeals for the Ninth Circuit?

2. Whether the forfeiture of a $100,000 surety bond was an abuse of discretion pursuant to where the government expanded relatively di minimis cost and time to apprehend the alleged fugitive and where counsel for the sureties was then formally filing motions to delay the surrender of the fugitive due to need to perform surgery on the fugitive?

3. Whether this Honorable Court must grant Certiorari to set forth National Guidelines to govern forfeitures in federal bail bonds where a relatively large bail is at stake against private homes/residences, and the United States has expended relatively di minimus costs to apprehend an alleged fugitive, within the need to interpret F.R. Crim. P. 46(e)(2) and (4)?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Sureties Tracy Nguyen and Khanh Bui, petitioners, seek a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit from the opinion filed February 8, 2002, rehearing and suggestion for rehearing en banc denied May 29, 2002.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit filed its published opinion on February 8, 2002. This appears as Appendix "A" to this petition.

On May 29, 2002 the U.S. Ninth Circuit denied a petition for rehearing and suggestion for rehearing en banc. A copy of that order appears as Appendix "C" to this petition. Circuit Judge Andrew Kleinfeld dissented from Denial of Rehearing.

JURISDICTIONAL GROUNDS

(i) The United States Court of Appeals for the Ninth Circuit denied the setting aside of a $100,000 bail forfeiture placed by the petitioners by a published Opinion filed February 8, 2002. A copy of that opinion appears at Appendix A-1. The published Opinion appears at 279 F.3d 1112 (9th Cir. 2002).

(ii) The U.S. Ninth Circuit denied a petition for Rehearing/Suggestion for Rehearing En Banc on

May 29, 2002. A copy of that Order appears at Appendix C-1. U.S. Circuit Judge Kleinfeld voted to grant rehearing of the 2-1 opinion refusing to set aside the $100,000 bail forfeiture.

(iii) Jurisdiction to review by Certiorari a decision of a United States Circuit Court in a criminal case is provided under 28 U.S.C. 1254.

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES FEDERAL RULE OF CRIMINAL PROCEDURE

RULE 46. Release from Custody

(e) **Forfeiture.**

(1) **Declaration.** If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) **Setting Aside.** The court may direct that a forfeiture he set aside in whole or in part, upon such conditions as the court may impose, if a person released upon execution of an appearance bond with a surety is subsequently surrendered by the surety into custody or if it otherwise appears that justice does not require the forfeiture.

(3) **Enforcement.** When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) **Remission.** After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

STATEMENT OF THE CASE

Petitioners Tracy Nguyen, an attorney, and Khanh Bui are homeowners in the Central District of California, and each placed a lien of $50,000 in favor of the United States against each of their domiciles to guarantee a $100,000 appearance bond for the brother-in-law of each petitioner, one Vinh Nguyen, who was granted federal bail on appeal when he was appealing his conviction to the U.S. Ninth Circuit in the case *United States v. Nguyen*, No. CR 96-32 AHS in the Central District of California.

This appeal was affirmed by a 3-Judge panel in *U.S. v. Nguyen*, 166 F. 3d 1219 (9th Cir. 1999), unpublished, in January 1999. Following denial of an En Banc petition, Vinh Nguyen was ordered to surrender to commence a 30-month sentence to federal prison.

During his time of release, Vinh Nguyen developed a nasal obstruction that affected his breathing, and he elected to have surgery performed prior to surrender; in all instances, these delays of surrender were memorialized in formal motions to the U.S. District Court sitting in Santa Ana, Orange County, California, the county where Vinh Nguyen was residing at the home of petitioner Khanh Bui. Similar petitions were made to the United States Court of Appeals for the Ninth Circuit, one of which was pending when Vinh Nguyen was arrested.

While brief stays were acquiesced in by the office of U.S. Attorney, and granted by the District Judge, soon thereafter an order was issued fixing the date of surrender. However, Nguyen did have surgery done, which conflicted with the surrender date, and a warrant was issued for his arrest, and U.S. Marshals attempted to serve

it at the residence designated as his abode, the home of petitioner-surety Khanh Bui.

Following a "stake-out" and periodic surveillances over a 2-week to 3-week period, Vinh Nguyen was arrested and jailed, never leaving the local area, and indicted on a new federal crime of bail jumping. He was tried before a jury in the same U.S. District Court that had granted him bail on appeal, the Hon. Alicemarie H. Stotler, and he was convicted.

Prior to this trial, U.S. District Judge Stotler ordered the forfeiture of the entire $100,000 bail bond amount placed against the 2 residences of the sureties.

An effort was made to hold an evidentiary hearing to demonstrate that di minimis expense to the United States and its U.S. Marshal system occurred, and therefore an arbitrary forfeiture of the entire $100,000 would be highly unjustified.

The U.S. District Court denied the motion via a written order of April 4, 2000, set forth as Exhibit "B" to this petition, and parallel minute order.

Surety-Petitioners assert that a key and significant conflict exists in the U.S. Circuit Courts which require this Honorable Court to Grant Certiorari to resolve this conflict, said conflict being made aware to the U.S. 9th Circuit 2 judge majority by a lengthy 1 judge dissenting opinion and set forth as Appendix "A" to this petition.

On May 29, 2002 the U.S. 9th Circuit rejected a Petition for Rehearing/Suggestion for Rehearing En Banc, U.S. Circuit Judge Andrew Kleinfeld voting to rehear the case/rehear En Banc. (Appendix "C")

REASONS FOR GRANTING CERTIORARI

1. To resolve, under the Due Process Clause of the Fifth Amendment, whether a United States District Court must, or at least should, hold an evidentiary hearing to ascertain any financial expenditures of the United States in apprehending an alleged federal fugitive before ordering a full forfeiture of a $100,000 bail undertaking placed by relatives of the fugitive against their domiciles, within the meaning of F. Rules Crim. P. 46(e)(2) and (4)

2. To resolve, under F. Rules Crim. Proc. 46(e)(2) and (4) whether justice does or does not require a global Bail forfeiture of $100,000 under conditions where government expenses in apprehension were relatively di minimis, an apparent resolution of first impression before this Honorable Court?

3. To resolve a clear conflict in the United States Circuit Courts whether or not such a hearing should be held before a full forfeiture of an entire bond is ordered?

ARGUMENT I

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER A UNITED STATES DISTRICT COURT MUST GRANT AN EVIDENTIARY HEARING TO RESOLVE ACTUAL MONETARY COST AND LOSS TO THE UNITED STATES BEFORE ORDERING OF FORFEITURE OF A $100,000 BAIL UNDERTAKING PLACED AGAINST PRIVATE AND OCCUPIED DOMICILES WHERE, AS HERE, A VERY SLIGHT RELATIVE COST WAS INCURRED BY THE GOVERNMENT TO APPREHEND AN ALLEGED FUGITIVE RELATIVE OF THE SURETIES.

At an evidentiary hearing the Sureties would have shown that a certain number of hours were expended by United States Marshals in "staking out" premises believed to be occupied by the alleged fugitive. Concomitantly, surety Tracy Nguyen, a member of the California Bar, along with current Counsel on this Petition for Certiorari, were filing motions in United States District Court to stay surrender of Vinh Nguyen due to impending nasal surgery to unblock a restricted nasal passage. In fact, the U.S. Marshal Service, aware of this surgery, recommended that it be completed before Vinh Nguyen was surrendered. Importantly, it is a matter of clearly established fact that Vinh Nguyen remained locally and made no effort to flee the jurisdiction.

In spite of these motions and a parallel effort to stay surrender via motions in the U.S. Ninth Circuit, U.S. Marshals affected the arrest of Nguyen within a few miles of the U.S. Courthouse in Santa Ana.

Even assuming a full-time U.S. Marshal, on the lookout for Nguyen, this would amount to no more than a 2 week to one-month salary for a Marshal, likely in the

neighborhood of $5,000. It is, therefore, asserted that the U.S. District Court abused its discretion to forfeit a total of $100,000 in bail undertaking against the 2 private residences of the sureties, effectively punishing the sureties for a perceived lag in surrender of Vinh Nguyen, again during the period that active motions to stay surrender were on file in the U.S. District Court. See dissent, Judge Andrew Kleinfeld, re the facts concerning this matter, Appendix A to this petition.

While it is evident that the court could order forfeiture of the $100,000 bond, it is here contended that the amount was disproportionately excessive, and this Court should grant Certiorari to set and fix guidelines for the United States District Courts in forfeitures where, as here, relatively minor expense is incurred by the government to "apprehend" a perceived "fugitive."

The dissent in the 9th Circuit case readily noted the authority extant in the 4th and 8th Circuits which there provided for District Courts making meaningful monetary forfeitures rather than arbitrary and huge total forfeitures.

Surely, of course, where several months of U.S. Marshal endeavor is demonstrated, and where, for example, the ultimate arrest is achieved in a state or foreign jurisdiction remote from the situs of designated surrender, greater impetus for full forfeiture is demonstrated. Here, however, such is far from the above extreme.

Criteria advanced to govern bail forfeitures are:

> 1) The defendant's willfulness in breaching a release condition; 2) the sureties' participation in apprehending the defendant; 3) the cost, inconvenience, and prejudice suffered

by the government; 4) mitigating factors; 5) whether the surety is a professional or a member of the family or a friend, and 6) the appropriateness of the amount of the bond.

See *United States v. Amwest Sur. Ins. Co.*, 54 F. 3d 601, 603 (9th Cir. 1995).

Examining the above 6 criteria, sureties assert:

1) While it can be asserted that the failure to surrender by Vinh Nguyen was "willful," it was engendered by actually performed nasal surgery and recovery therefrom. Licensed physicians performed this surgery, and it can not be asserted the surgery was a sham.

2) Surety Tracy Nguyen, attorney and co-counsel for Vinh Nguyen, and his sister-in-law, clearly was filing motions to stay the surrender due to the medical problems believed by Tracy Nguyen to support the motions to stay surrender. While this could be construed as a "pro-active" effort by a surety to delay, avoid, or thwart surrender, rather than accomplishing a quick surrender, it is also clear that this was a well-documented and Sixth Amendment guarantee by counsel to serve the client.

3) It is here asserted that there was relatively di minimis cost, inconvenience, and absolutely little to zero prejudice suffered by the government, the magnitude of which would have been, and should have been, established by the government at an evidentiary hearing. While the Majority 2 judge opinion seems to decry the government counsel's time expended in "replying to motions," it must be

clear that that is precisely the role government counsel is being paid a standard salary for, and no showing is made that "overtime" pay was here incurred. Appropos of an often-cited quote by the 33rd U.S. President, Harry S. Truman, would be here relevant: "If you can't stand the heat, get out of the kitchen."

4) As to mitigation, it is clear that Vinh Nguyen did not, at any time, flee the jurisdiction, and remained in constant contact with his physicians and legal counsel within a few miles of the federal courthouse.

5) Here the sureties are private family members, rather than a professional bonding company who, perhaps, willingly accepts risk for its 10% bail premium, and, as well, generally also encumbers real estate to insure safety on its bonds. The result of this forfeiture is, in fact, punishment of the sureties, a misguided consequence and a diversion away from the fugitive who should be the only punishee, if anyone is to be punished.

6) And finally the appropriateness of the bail amount of $100,000 must be placed against the relative minor cost to the government.

It is clear these 6 criteria should be examined, and interpreted by this Honorable Court, in an opinion that would guide the United States District Courts in all 50 states. Certiorari should, therefore, be granted.

ARGUMENT II

CERTIORARI SHOULD BE GRANTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT TO RESOLVE A CLEAR CONFLICT IN THE CIRCUIT COURTS WHETHER AN EVIDENTIARY HEARING MUST BE GRANTED IN U.S. DISTRICT COURT TO SHOW ACTUAL COST (DI MINIMIS) TO THE UNITED STATES AND ITS MARSHAL SERVICE TO APPREHEND AN ALLEGED FUGITIVE BEFORE THE COURT ORDERS FORFEITURE OF $100,000 BAIL UNDERTAKING PLACED AGAINST TWO PRIVATE RESIDENCES OWNED AND OCCUPIED BY SURETIES AND THEIR FAMILIES.

There currently exists a gross and significant conflict of authorities in the United States Circuit Courts concerning the appropriateness of forfeiture of significantly large bail amounts placed against private residences by family members to support release of another family member on a Bail Bond, where a relatively small cost has been incurred by the United States and its U.S. Marshall service to "apprehend" the alleged fugitive.

At bar, sureties Tracy Nguyen and Khanh Bui, a sister-in-law and a brother-in-law of the individual granted Federal Bail on appeal at $100,000, Vinh Nguyen, placed their personal residences at risk for $50,000 each.

Due to medical problems suffered by Vinh Nguyen, affecting his breathing, surgery was scheduled, and was actually performed, on Vinh; during this period, counsel sought formal stays in surrender before both the United States District Court, and the United States Court of Appeals for the Ninth Circuit. The District Court denied a stay, and before the Ninth Circuit acted, the U.S. Marshals arrested Vinh Nguyen in the area of his residence,

and the U.S. District Court directed forfeiture of the entire $100,000 Bail Bond. An evidentiary hearing would have established that relatively di minimis expenses were incurred by the U.S. Marshal's service, and that the target of the arrest at no time left the local area, he then convalescing from nasal surgery to correct a breathing obstruction.

Sureties assert that the refusal to hold an evidentiary hearing to place a monetary amount on actual cost to the United States (a few hundred dollars to a few thousand dollars!) instead of forfeiture of the entire $100,000 is an abuse of discretion of a United States District court, and other United States Courts of Appeals have ruled that such effort to calculate costs should be made. See, e.g., *Appearance Bond Surety v. United States*, 622 F. 2d 334 (8th Cir. 1980) (Father appealed the forfeiture of $25,000 of a $100,000 bond executed as surety on behalf of his son; son failed to surrender, was arrested by Minneapolis, Minnesota police at a local motel, 4 hours after he failed to surrender).

In setting aside the $25,000 forfeiture and reducing it to only $1000, the 8th Circuit held:

> (4)(5) The surety's final contention is that the court's remission of only $75,000 is an abuse of discretion. We agree. According to Fed. R. Crim. P. 46(e)(2) & (4), a forfeiture may be set aside or remitted in whole or in part if justice does not require enforcement. The factors to be considered include the willfulness of the breach, the expense, inconvenience and delay to the government, and any other mitigating circumstances. See *United States v. Stanley*, 601 F.2d 380, 382 (9th Cir. 1979); see e.g. *United States v. Nash*, 429 F.2d 533 (8th Cir. 1970); *Larson v. United States*, 296 F.2d 167 (8th Cir. 1961). Moreover,

> "(the) forfeiture ought to bear some reasonable relation to the cost and inconvenience to the government of regaining custody and again preparing to go to trial." *United States v. Kirkman*, 426 F.2d 747, 752 (4th Cir. 1970).
>
> (6) Although there is evidence the breach was willful, the expense, inconvenience and delay to the Government were minimal. Ivers was apprehended at 6:00 PM after only a four-hour search, and he appeared before the district court and plead guilty the following morning. We conclude that justice does not require forfeiture of $25,000, and that all but $1,000 should be remitted.
>
> The district court order remitting $75,000 is reversed, and the case remanded with directions to enter an order remitting $99,000 of the forfeited surety bond.

See also *Jeffers v. United States*, 588 F. 2d 425, 427 (4th Cir. 1978); *United States v. Kirkman*, 426 F. 2d 747, 752 (4th Cir. 1970); *Accredited Surety and Casualty Co. v. United States*, 723 F. 2d 368, 369-70 (4th Cir. 1983) ("[A] forfeiture should bear some reasonable relationship to the cost and inconvenience to the government and the courts").

This authority from both the U.S. Fourth and Eighth Circuits support, unlike the instant Ninth Circuit, the principle that the District Court must make a meaningful evaluation of cost/expense to the United States, rather than arbitrary forfeiture of a huge bail.

Certiorari should be granted to the U.S. Ninth Circuit.

CONCLUSION

A clear conflict in authority now existing in the United States Circuits Courts concerning the refusal to hold an evidentiary hearing, and to actually assess costs expended by the United States to apprehend an alleged federal fugitive, as opposed to the arbitrary forfeiture of a relatively large $100,000 Bail Bond against personal residences owned by the sureties, Certiorari should be granted to the United States Court of Appeals for the Ninth Circuit.

National uniformity is highly desirable and necessary to govern forfeiture of Bail of a relatively huge amount where a di minimis cost to the United States and its U.S. Marshal service has occurred, and where as here, counsel was filing motions to stay surrender of the subject of the Bail.

Dated: August 22, 2002.

Respectfully submitted,

ROGER S. HANSON, ESQ.
Counsel to Sureties
Member of Bar
Supreme Court of the United States

APPENDIX "A"

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	
v.	No. 00-55795
SURETIES TRACY NGUYEN; KHANH BUI, *Claimants-Appellants,*	D.C. No. CR-96-00032-AHS
v.	OPINION
VINH HUU NGUYEN, *Defendant.*	

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Argued and Submitted
September 13, 2001 – Pasadena, California

Filed February 8, 2002

Before: Ferdinand F. Fernandez, Andrew J. Kleinfeld,
M. Margaret McKeown, Circuit Judges.

Opinion by Judge McKeown;
Dissent by Judge Kleinfeld

COUNSEL

Roger S. Hanson, Santa Ana, California, for the claimants-appellants.

Jean Rosenbluth, Assistant United States Attorney, United States Attorney's Office, Los Angeles, California, for the plaintiff-appellee.

OPINION

McKEOWN, Circuit Judge:

This case arises out of Vinh Huu Nguyen's conviction for fraud and his subsequent failure to surrender to serve his prison term. Pending his appeal, the court allowed Nguyen to remain free on a bond secured by property belonging to Tracy Nguyen, his sister-in-law, and Khanh Bui, his brother-in-law (collectively "the Sureties"). When Nguyen failed to self-surrender in accord with the court's order, the district court granted the government's application for judgment of default on bond forfeiture. The Sureties claim that the district court abused its discretion in ordering that the entire $100,000 bond be forfeited. We disagree and we affirm.

BACKGROUND

Nguyen was convicted of eleven counts of loan fraud and sentenced to a thirty-month prison term. The district court increased his bond from $50,000 to $100,000 and released him pending appeal. The Sureties secured the bond with their equity in residential properties. Bui offered as collateral a house that he owned but did not live in; Tracy Nguyen offered her residence, although she also owned commercial property in which her office was located.

Nguyen was successful in the appeal of his sentence. In January 1999, we affirmed the conviction and remanded for resentencing. *United States v. Nguyen,* 166 F.3d 1219 (9th Cir. 1999) (unpublished). Following remand, the district court reimposed the thirty-month sentence, denying Nguyen's request to remain free on bond pending an anticipated habeas petition. Over the prosecution's objection the district court did, however, grant Nguyen's request to remain free for a few extra weeks to care for his sick wife. The court imposed a self-surrender deadline of noon, March 22, 1999.

Just three days before the surrender date, Nguyen filed another request to stay surrender pending resolution of his habeas petition. The court denied the application and ordered that "Defendant must surrender as previously ordered by this Court on Monday, March 22, 1999, at 12:00 noon." March 22 came and went, but Nguyen did not surrender himself. Instead, he visited a hospital emergency room, complaining of breathing difficulties and nose bleeding related to a nasal condition from which he had been suffering for several months. Hospital personnel later testified that he was released at five minutes after noon, that his condition required no treatment, and that they had declined to write a note excusing him from "court." He then proceeded to his own physician, Dr. Tran, who found no signs of recent bleeding. On the pretext that he needed a note for work, Nguyen obtained a note from the office manager. Unaware that Nguyen was due in prison, Dr. Tran agreed to schedule surgery on March 26.

Tracy Nguyen, now acting as Nguyen's attorney as well as surety, delivered to the U.S. Marshal's Office a declaration stating that Nguyen was unable to surrender himself because of these medical problems. Upon receipt of

the declaration, the prosecutor called Dr. Tran, who advised that Nguyen was scheduled for minor, outpatient surgery on March 26, and that he could report to prison by March 29 at noon, assuming adequate follow-up medical care was available. At the prosecutor's request, the court issued a bench warrant but agreed to delay execution until March 29 at noon.

Although he had been informed of the new surrender date, once again the deadline passed and Nguyen did not surrender himself. Instead of having the surgery as scheduled, he consulted a new doctor on March 25, again failing to inform the doctor that he was overdue in prison. Nguyen underwent out-patient surgery on March 30. According to his doctors, had they known he was scheduled to go to jail, they would not have recommended or scheduled surgery.

As deadlines came and went, Tracy Nguyen continued to file motions to stay the surrender, both on medical grounds and pending resolution of a habeas petition. The district court found, however, that the motions raised nothing new, based as they were on the same grounds that had been previously rejected.

During the weeks prior to his arrest, Nguyen's location was also a mystery. He left after-hours messages with his pretrial services officer, sidestepping personal visits and stating that he was under a doctor's care. Nguyen told the court that he would be living at Bui's home during his supervised release, but he apparently was not, at least during the time at issue here. He had, in fact, purchased a house under his father-in-law's name. Although he later denied that he was living at this second address, he gave the telephone number at the second address to the pretrial

services officer, received messages at the second address, and filled out a change-of-address form, listing the second address as his new one.

After he missed the final deadline, the court issued a bench warrant. The U.S. Marshals set up surveillance and eventually entered Bui's home pursuant to an arrest warrant, but found no sign of Nguyen. On April 20, 2000, U.S. Marshals arrested Nguyen at a work address.

Nguyen was tried and convicted of failing to surrender himself, in violation of 18 U.S.C. § 3146(a), for which he was sentenced to serve an additional eighteen months. We affirmed his conviction in a separate disposition. *United States v. Nguyen,* No. 00-50446, 2001 WL 1153253 (2001) (unpublished). Having stayed the forfeiture proceedings pending the results of Nguyen's bail jumping trial, the district court entered judgment against the Sureties for $100,000, the entire amount of the bond, and declined to remit the forfeiture.

DISCUSSION

The law on bail forfeiture is neither complex nor voluminous. The Federal Rules of Criminal Procedure provide: "If there is a breach of a condition of a bond, the district court shall declare a forfeiture of the bail." Fed. R. Crim. P. 46(e)(1). The forfeiture is thus mandatory. *United States v. Abernathy,* 757 F.2d 1012, 1015 (9th Cir. 1985). However, under Rule 46(e), the district court

> (2) . . . may direct that a forfeiture be set aside in whole or in part, upon such conditions as the court may impose, if a person released upon execution of an appearance bond with a surety is subsequently surrendered by the surety into

> custody or if it otherwise appears that justice does not require the forfeiture. . . . [And](4) . . . may remit it in whole or in part under the [same] conditions. . . .

Fed. R. Crim. P. 46(e)(2) & (4).

We review the district court's denial of a motion for relief from bond forfeiture for abuse of discretion. *United States v. Amwest Sur. Ins. Co.,* 54 F.3d 601, 602 (9th Cir. 1995). Given the wide discretion afforded the district court in this arena, we cannot say that the district court acted arbitrarily or capriciously in its well-reasoned decision not to set aside or remit the forfeiture in this case. *See United States v. Frias-Ramirez,* 670 F.2d 849, 852 (9th Cir. 1982). We are not unmindful or "[un]sympathetic to the consequences a forfeiture may have on the sureties in this case," *id.,* but the standard of review guides our decision here.

Following the law of this circuit, the district court considered six factors in deciding whether to set aside or remit the forfeiture of the bond:

> 1) the defendant's willfulness in breaching a release condition; 2) the sureties' participation in apprehending the defendant; 3) the cost, inconvenience, and prejudice suffered by the government; 4) mitigating factors; 5) whether the surety is a professional or a member of the family or a friend, and 6) the appropriateness of the amount of the bond.

Amwest, 54 F.3d at 603 (citations omitted). Although we have held that "[t]hese are merely non-exclusive factors for consideration, and '[n]ot all of the factors need to be resolved in the government's favor,'" *United States v.*

Sar-Avi, 255 F.3d 1163, 1167 (9th Cir. 2001), here the scales tip heavily in the government's favor.

The record amply supports a finding as to the first factor, that Nguyen acted willfully, understanding that he was legally required to give himself up, and actively dodging law enforcement. The district court found that Nguyen's medical problems did not prevent his self-surrender on the original date and that his "eleventh hour applications to extend his bond release" did not relieve him of the duty to surrender himself. Indeed, not only did the district court reject his medical excuse, the jury in his criminal prosecution did so as well. No medical emergency prevented his surrender.

The district court placed particular emphasis on the fact that Nguyen was arrested at work, when he and his attorney/surety Tracy Nguyen, had consistently claimed that he was unable to surrender because he was home recuperating from surgery. Nguyen essentially thumbed his nose at the court-imposed deadlines. He parlayed what started out as a short extension for humanitarian reasons – so Nguyen could care for his wife – into a series of delays and purposeful evasion. As in past cases in which we have found full forfeiture permissible, *see, e.g., Abernathy,* 757 F.2d at 1015 (holding use of alias and travel sufficient to show willfulness), Nguyen's numerous misrepresentations and evasions support the district court's determination that his breach was willful.

The second factor focuses on the Sureties' participation in apprehending the defendant. As sureties, Bui and Tracy Nguyen had one simple obligation – to assure Nguyen's appearance when promised. *United States v. Felix-Meza,* 825 F.2d 1334, 1336 (9th Cir. 1987) (per

curiam). It was their duty to learn whether he was in violation of the bond requirements, not the court's duty to give them notice. *United States v. Vera-Estrada,* 577 F.2d 598, 600 (9th Cir. 1978).

Tracy Nguyen and Bui do not contest the fact that they played no role in Nguyen's eventual apprehension. The district court specifically found that Tracy Nguyen assisted not his apprehension, but his evasion. Although she talked with Nguyen frequently, she did nothing to assure his presence. Instead, she filed four motions to stay the surrender, none of which asserted any colorable grounds.

The evidence casts doubt on Bui's ignorance of Nguyen's evasion as well. Nguyen listed Bui's address as his residence, apparently deceptively, but Bui failed to correct the deception even after U.S. Marshals came to his house looking for Nguyen. Although it is not clear from the record whether the Sureties were aware of the full extent of Nguyen's shenanigans, there is substantial support for the district court's conclusion that they acted to hinder, not assist, his apprehension.

We cannot countenance the Sureties' argument that Tracy Nguyen's complicity in Nguyen's evasion is excused by her dual status as his lawyer and as a surety. To the extent she placed herself in a position of conflict, the circumstance was one of her own making. She agreed to represent Nguyen knowing that his failure to surrender could result in forfeiture of the bond that she had pledged. She cannot escape her obligations as a surety simply by wrapping herself in the cloak of his attorney. The district court was within its discretion to conclude that this factor weighed heavily in favor of the government.

The third factor looks to the cost, inconvenience, and prejudice suffered by the government as a result of the breach. Nguyen's evasion triggered a search and stakeout effort by the government. In addition, the government was forced to reply to multiple requests – as it turns out, disingenuous – to extend the surrender date. The Sureties' argument that the government had no costs because it cannot show overtime payments borders on frivolous. The government has no obligation to furnish a bill of costs, *see Sar-Avi,* 255 F.3d at 1168, nor can the cost and inconvenience factor be dismissed simply because they were not substantial.

The fourth consideration is the presence of mitigating factors, and the fifth is the surety's status.[1] The district court properly weighed Nguyen's apparent continued presence in the area, and the Sureties' nonprofessional status and family relationship, as mitigating factors but found these factors unpersuasive in light of Nguyen's egregious conduct, in which the Sureties were complicit.[2]

The sixth and final factor among the non-exclusive considerations is the appropriateness of the bond amount.

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[1] The Sureties assert in passing that they were denied equal protection of the law, apparently because professional sureties are sometimes granted relief from forfeiture when they deliver the defendant into custody. To the extent this argument is cast as a separate claim, we decline to entertain it because no such claim was raised in the district court. *Int'l Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985).

[2] We decline to adopt, as the dissent apparently urges, a "loving relative" exception to our bond forfeiture jurisprudence. We believe that a loving relative, particularly an attorney, would be better advised to counsel her fugitive relation to obey, rather than ignore, court orders.

It is apparent from colloquy between counsel and the court that the district court considered this factor. Although we acknowledge that the amount was significant, we cannot say that it was excessive or that the district court's failure to exercise its discretion to lower the sum forfeited was reversible error. As we explained in *Amwest,* a bond functions like liquidated damages in that it must be reasonable when set; it need not necessarily approximate the actual costs of breach. 54 F. 3d at 604. Indeed, in *United States v. Stanley,* we affirmed a forfeiture where there was no showing of specific cost or prejudice to the government, but, like here, there was a willful breach of conditions and an absence of mitigating circumstances. *United States v. Stanley,* 601 F.2d 380, 382 (9th Cir. 1979).

Nguyen was convicted of eleven counts of loan fraud for which he was sentenced to serve over two years in prison and pay $300,000 restitution. At the time, the court deemed him a flight risk and set the bond amount accordingly. The initial $50,000 bond was increased to $100,000 after his conviction. At the bond hearing, the district court concluded that "these conditions [including the amount] seem to me to be minimal in order to allow that he be released pending further proceedings." As in *Frias-Ramirez,* the court "found the amount of defendant's bail to have been appropriate in light of the nature of the offense. . . . " 670 F.2d at 853.

There is no question that "the sureties entered the bonding agreement aware of the consequences. . . . " *Id.* Regrettably, counsel's prediction that he did not "believe that Mr. Nguyen is going to put his [relatives] in the position of losing $50,000, much less a hundred thousand" turned out to be a hollow prophecy. Reviewing all the factors, particularly willfulness of Nguyen's breach,

complicity of the Sureties, and absence of compelling mitigating circumstances, we conclude that the district court did not abuse its discretion in ordering forfeiture of the full amount of the bond.

AFFIRMED.

KLEINFELD, Circuit Judge, dissenting:

I agree that forfeiture was mandatory. The district court did not abuse its discretion in denying the motion to remit the forfeiture in its entirety. I disagree, though, on remission in part. There was no good reason to forfeit the entire amount of the bond. The district court did not give any reason at all for why the whole bond, not just part, should have been forfeited. The district court focused entirely on whether there should be a forfeiture, not on how much. Failure to remit in part was an abuse of discretion.

The $100,000 in security was probably designed to cover the expense of fetching Nguyen if he fled to a foreign country or otherwise put the government to great expense. But all Nguyen did was fail to show up at the marshal's office, and put the government to the minimal burden of telephoning and driving around town to get him. A hundred thousand dollars is a lot of money for doing nothing more than looking around town for less than three weeks before picking Nguyen up at his place of business and giving him a ride in a government car. Nguyen's sister-in-law and brother-in-law will probably both lose their homes because of the forfeiture. They are not the criminals in this case. It is tragic when people post bail for a family member in trouble, only to be ruined for their kindness when their

kin jumps bail. Today's decision may affect a lot of common situations, as when people's children are arrested for drug crimes or their husbands or wives for drunk driving, embezzlement, or tax offenses. If bail is set high enough to catch an international fugitive, but all that happens is that the criminal fails to show up (the majority opinion says Nguyen "essentially thumbed his nose" but to me it looks more like panic about going to jail than insouciance) and is easily and locally caught, there is no good reason to forfeit so large an amount.

The district court had discretion to set aside the forfeiture or remit judgment on the forfeiture "in whole or in part" "if it otherwise appears that justice does not require the forfeiture."[1] What "justice requires" depends on the purpose of bail bonds. The purpose of bail bonds is to make sure defendants show up for court,[2] not to punish them or their families if they don't. Here, the record supports the district court's determination that Nguyen willfully failed to appear, but that does not answer the question of whether it was an abuse of discretion not to remit the forfeiture in part.

The district court's ruling did not speak to the amount of the forfeiture, as opposed to whether there ought to be a

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[1] Fed. R. Crim. P. 46(e)(2) & (4) (2001).

[2] *United States v. Vaccaro,* 51 F.3d 189, 192 (9th Cir. 1995) ("[G]enerally the purpose of a bail bond is to insure that the accused will reappear at a given time.") (quoting *United States v. Toro,* 981 F.2d 1045, 1049 (9th Cir. 1992) (internal quotation marks and alteration omitted)); *United States v. Bass,* 573 F.2d 258, 260 (5th Cir. 1978) ("The purpose of a bail bond is not punitive; it is to secure the presence of the defendant.").

forfeiture. And the district court only addressed the six factors we described in *United States v. Amwest Surety Insurance Co.*[3] as they applied to forfeiture, not as they applied to partial remission. The district judge explained why full remission was not appropriate, not why partial remission was not. We had previously described, in *United States v. Abernathy*[4] and *United States v. Frias-Ramirez,*[5] only four factors, and have since noted two more; the law of this circuit is that "[t]hese are merely non-exclusive factors for consideration. . . . "[6] Because the district court's ruling did not address whether the six factors justify partial remission, and the record does not show that the district court considered partial remission, we cannot properly hold that it did not abuse its discretion in denying partial remission. We should remand the case so that the district court may consider partial remission pursuant to these and any other relevant factors.

In ruling on the forfeiture, the district court said that (1) "the Sureties failed to ensure defendant's appearance"; (2) "Surety Nguyen assisted and was complicit in defendant's willful efforts to avoid and extend his self-surrender date"; (3) "Ms. Nguyen was proactive in keeping Mr. Nguyen out of custody"; (4) "the government was put to significant cost and inconvenience in trying to locate defendant, having staked out his residence and his

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[3] 54 F.3d 601, 603 (9th Cir. 1995).

[4] 757 F.2d 1012, 1015 (9th Cir.), *cert. denied,* 474 U.S. 854 (1985).

[5] 670 F.2d 849, 852 (9th Cir.), *cert. denied,* 459 U.S. 842 (1982).

[6] *United States v. Sar-Avi,* 255 F.3d 1163, 1167 (9th Cir. 2001). *Accord Amwest,* 54 F.3d at 603; *Abernathy,* 757 F.2d at 1015; *Frias-Ramirez,* 670 F.2d at 852.

business." The district court did not explain why these factors justify a full $100,000 forfeiture rather than a remission down to, say, $5,000.

Also, reasons two and three, the "complicit" and "proactive" reasons, strike me as unjustified as a matter of law. Tracy Nguyen, besides being married to defendant Nguyen's brother, was his lawyer. The conduct that the district court characterized as "complicit" and "proactive" was her filing of court papers to get continuances of Nguyen's surrender date and avoid penalties for her client. It may have been imprudent to act as both surety for the defendant, in which role she would be best served by his being promptly locked up in jail, and as counsel for him, which gave her a duty to try to keep him out of jail and get him excused when he went for medical care on his troublesome nose instead of going to jail. But all she did to keep him out of jail was file papers and make representations in court, none of which have been found to be false. Language implying criminality or wrongfulness of a lawyer's conduct in trying to keep her client out of jail is misplaced.

Tracy Nguyen served her client better than she served herself. Many loving relatives – wives who in the wee hours bail out husbands arrested for drunk driving, parents who go surety for children facing drug charges – act imprudently in terms of their own interests, but such conduct ought not to be characterized as wrongful. Under *Amwest,* the district court should have considered whether the sureties' status as family members, rather than

professionals, supported mitigating the forfeiture with partial remission, [7] but did not.

There is one factor that the district court ruling and the majority do not discuss, that ought to have been considered regarding remission (not forfeiture), and that is the expense of apprehending Nguyen. The majority says that the government need not provide itemized proof of expenses,[8] and that is correct.[9] But that proposition does not mean that the court should disregard the minimal financial burden to the government. Remission should be used to accomplish a rough proportionality between the extent of the forfeiture and the extent of the government's burden.[10]

We held in *Amwest* that one factor is "appropriateness of the amount of the bond," and that factor "looks more to the proper fixing of the amount of the bond" than to the cost of apprehension.[11] That is plainly correct when a court looks back to see whether bail was set too high. Bail was not set too high in this case. Nguyen spoke at least one foreign language and could have fled to a foreign country

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[7] *Amwest,* 54 F.3d at 603.

[8] Maj. Op. at 2195.

[9] *See Sar-Avi,* 255 F.3d at 1168.

[10] *See Accredited Surety & Casualty Co. v. United States,* 723 F.2d 368, 369-70 (4th Cir. 1983) ("[A] forfeiture should bear some reasonable relation to the cost and inconvenience to the government and the courts."); *Appearance Bond Surety v. United States,* 622 F.2d 334, 337 (8th Cir. 1980) ("Moreover, [the] forfeiture ought to bear some reasonable relation to the cost and inconvenience to the government of regaining custody. . . . ") (internal quotation marks omitted).

[11] *Amwest,* 54 F.3d at 603-604.

and been extremely difficult to re-apprehend. *Amwest* goes on to say that "bail bonds are contracts for liquidated damages,"[12] but that proposition can only be correct insofar as it speaks to appropriateness of the amount initially set as bail. Were it read more broadly, to mean that remission should not take into account subsequent events and expenses, then it would contradict the federal rule which it construes. As the majority concedes, Federal Rules of Criminal Procedure 46(e)(2) and (4) provide that the district court may "remit . . . in part" if "justice does not require" the entire amount to be forfeited.[13] Partial remission as provided for by the Rule could generally not be granted if the liquidated damages analogy controlled where the bail had not been mistakenly set too high. Where a liquidated damages provision in a contract is not invalid as a penalty, the specified amount can be recovered without regard to actual damages.[14] In *Amwest,* the bond was for $100,000, the surety was a professional[15] (not a relative, which we said in *Amwest* would have been a mitigating factor[16]), the defendant fled the jurisdiction[17] (Nguyen did not), and the government spent $37,000 to catch him[18] (Nguyen was easily and locally picked up), so the case should be distinguished on its facts.

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[12] *Id.* at 604.

[13] Fed. R. Crim. P. 46(e)(2) & (4) (2001).

[14] *See Restatement (Second) of Contracts* § 356 & comments a & b (1981).

[15] *Amwest,* 54 F.3d at 604.

[16] *Id.* at 603.

[17] *Id.* at 602.

[18] *Id.* at 603.

In the Fourth Circuit, "a forfeiture should bear some reasonable relation to the cost and inconvenience to the government and the courts."[19] The Eighth Circuit uses the same language.[20] The "reasonable relationship" may allow for "a substantial forfeiture to deter," not just reimbursement of government expense,[21] but it still requires a look at the amount relative to the circumstances at the time of the forfeiture.

Quite often it is reasonable to set a fairly high bail where there is a serious risk of flight that might put the government to great expense to apprehend the defendant. That was so here. The $100,000 bail was appropriate as an analog to liquidated damages, so remission was not required under the language in *Amwest*. Quite often as well, a defendant violates the bail order without imposing a great burden on the government, so there is no just purpose for imposing the entire forfeiture on some suffering relative who posted bail.

There are circumstances where we are supposed to follow some rigid law without regard to what is just in the particular circumstances. This is not one of them. The law itself, Federal Rule of Criminal Procedure 46(e)(2), says that the district court is supposed to remit the bond in

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[19] *Accredited Surety*, 723 F.2d at 369-70; *Jeffers v. United States*, 588 F.2d 425, 427 (4th Cir. 1978); *United States v. Kirkman*, 426 F.2d 747, 752 (4th Cir. 1970).

[20] *Appearance Bond Surety*, 622 F.2d at 337 (quoting *Kirkman*, 426 F.2d at 752).

[21] *Jeffers*, 588 F.2d at 427. *But see Kirkman*, 426 F.2d at 752 ("Forfeitures are not properly ordered for the purpose of enriching the government or to punish a defendant.").

whole or part "if it otherwise appears that justice does not require the forfeiture."[22]

Tracy Nguyen put herself financially at risk for a brother-in-law she sees once a year at Chinese New Year. The security she posted "is my only residence where I live with my husband and two small children." Bui is in the same situation, except that more family members (his wife, mother-in-law, and four children) live in the home to be forfeited. Justice does not require the draconian result imposed, and the district court did not consider the factors it is required to consider as they applied to partial remission, so we should remand for remission pursuant to those factors. We have a rule that instructs us to consider justice in the circumstances of the particular case, so we ought to do that, instead of construing the rule in a way that turns it into something blind and mechanical.

I respectfully dissent.

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[22] Fed. R. Crim. P. 46(e)(2) (2001).

APPENDIX "B"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CRIMINAL MINUTES – GENERAL

Case No. *SA CR 96-32 AHS* Date *April 4, 2000*

Title *United States of America v. Vinh Huu Nguyen*

PRESENT: HON. *ALICEMARIE H. STOTLER,*
JUDGE (IN CHAMBERS)

Debra Beard	*Not Present*
Deputy Clerk	Court Reporter

PROCEEDINGS: RULING GRANTING GOVERNMENT'S EX PARTE APPLICATION FOR JUDGMENT OF DEFAULT ON BOND FORFEITURE

Having heard oral argument from the parties on April 3, 2000, the Court now rules: for good cause shown, the government's Ex Parte Application for Judgment of Default on Bond Forfeiture is granted.

A. Procedural Background

On July 31, 1996, defendant was convicted on all eleven counts of an indictment charging him with loan and mail fraud. The Court allowed defendant to remain free pending appeal on a $100,000 bond secured by short form deeds of trust belonging to sureties Khanh Bui and Tracy Nguyen ("Sureties"), who are jointly and severally liable for the $100,000 amount.

The Court of Appeals for the Ninth Circuit affirmed defendant's conviction and 30-month sentence of defendant. On March 8, 1999, the Court resentenced defendant and ordered that he surrender himself to the custody of the Marshal no later than 12 noon on March 22, 1999. Defendant failed to self-surrender as ordered. The bench warrant for defendant's arrest was signed March 26, 1999, and was filed on March 29, 1999. The bench warrant ordered defendant's bond forfeited. Defendant was arrested on April 20, 1999.

The government initiated a separate prosecution against defendant for his failure to self-surrender in *United States of America v. Vinh Huu Nguyen,* SA CR 99-131 AHS. On December 10, 1999, the government moved to stay the proceedings on bond forfeiture in this case, pending the resolution of the trial in SA CR 99-131 AHS. The Sureties opposed the motion On December 22, 1999. On January 18, 2000, the Court stayed the bond forfeiture proceedings.

Defendant was convicted by jury on February 8, 2000, in SA CR 99-131 AHS. The Court set a hearing on defendant's bond forfeiture for March 20, 2000. Pursuant to the Stipulation and Order filed February 28, 2000, the hearing on bond forfeiture was continued to April 3, 2000.

Having reviewed all relevant filings with the Court, having considered the arguments made by counsel, and having conducted independent research, the Court grants the government's motion and directs entry of judgment on defendant's bond forfeiture.

B. Defendant's Bond Forfeiture

Forfeiture of the $100,000 bond is appropriate here pursuant to Fed. R. Crim. P. 46(e). When there is a breach of a condition of the bond, the district court shall declare a forfeiture. *United States v. Abernathy,* 757 F.2d 1012, 1015 (9th Cir.), *cert. denied,* 474 U.S. 854 (1985); *United States v. Stanley*, 601 F.2d 380, 382 (9th Cir. 1979). It is the surety's responsibility to ensure the defendant does appear and learn when he does not. *United States v. Felix-Meza,* 825 F.2d 1334, 1336 (9th Cir. 1987). The Court may consider the following six factors when deciding whether to remit the forfeiture of a bond: (1) the defendant's willfulness in breaching a release condition; (2) the sureties' participation in apprehending the defendant; (3) the cost, inconvenience, and prejudice suffered by the government; (4) mitigating factors; (5) whether the surety is a professional or a member of the family or a friend; and (6) the appropriateness of the amount of the bond. *See United States v. Amwest Surety Insurance Company,* 54 F.3d 601, 603-604 (9th Cir. 1995)

Here, the evidence adduced at trial showed that defendant's nasal problems did not prevent him from self-surrendering on March 22, 1999, and that the *Amwest* factors weigh in favor of forfeiture. The medial testimony bears out the government's contention that defendant failed to notify the doctors of his self-surrender date, and that any physician-recommended surgery was made in the absence of such knowledge. Defendant's eleventh-hour applications to extend his bond release, as determined first, by the Court, and second, by the jury, were not based on any bona fide medical emergency, nor did they extinguish his promise and duty to self-surrender.

Moreover, the Sureties failed to ensure defendant's appearance on March 22, 1999, despite their having posted the appearance bond, and, as reflected in her own testimony at trial, Surety Nguyen assisted and was complicit in defendant's willful efforts to avoid and extend his self-surrender date. Defendant's continued presence in this district and familial relationship with Surety Nguyen, while perhaps mitigating factors, are not persuasive to the Court where defendant was shown to be at his place of business within the district when arrested, as opposed to recuperating at home, and where Ms. Nguyen was proactive in keeping Mr. Nguyen out of custody. These mitigating factors do not outweigh the aggravating factors that support forfeiture.

Lastly, the government was put to significant cost and inconvenience in trying to locate defendant before his apprehension, having staked out his residence and business, although a specific showing of such costs is not necessary for bond forfeiture to be appropriate. *See United States v. Frias-Ramirez,* 670 F.2d 849, 853 (9th Cir.), *cert. denied,* 459 U.S. 842 (1982). It is also true, as government counsel argues, that defendant's motions for extensions of time, albeit unavailing, had to be responded to thus precluding use of government resources for other matters.

The Court has this date filed the proposed Order re Judgment of Default lodged by the government on November 12, 1999, and the Clerk shall serve this minute order on counsel for all parties in this action.

APPENDIX "C"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, SURETIES TRACY NGUYEN, et al., Claimants-Appellants, v. VINH HUU NGUYEN, Defendant.	No. 00-55795 D.C. No. CR-96-00032-AHS Central District of California, Santa Ana ORDER (Filed May 29, 2002)

Before: FERNANDEZ, KLEINFELD, and MCKEOWN, Circuit Judges.

A majority of the panel voted to deny the petition for rehearing and rehearing en banc. Judge Kleinfeld voted to grant the petition for rehearing and rehearing en banc.

The full court was advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and rehearing en banc is DENIED.